Supreme Court, U.S.
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No. 96-1801

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DEBRA M. SMOLKO,
Petitioner,

v.

GTE SERVICE CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL W. JOHNSTON
Counsel of Record
SCOTT G. BLEWS
KING & SPALDING
191 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 572-4600
Counsel for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

I. Whether compelling reasons exist for this Court to issue a writ of certiorari for the purpose of interpreting Fed. R. Civ. P. 4(m), even though the issues presented are neither of great importance to the public, novel, nor difficult, do not raise a conflict among the circuits, and were correctly decided below.

PARTIES TO PROCEEDINGS BELOW

Respondent certifies the parties listed in the caption are the only parties who appeared in the proceedings below. In accordance with Sup. Ct. R. 29.6, Respondent further certifies it has no subsidiaries and its parent corporation is GTE Corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	4
I. No Issues Of Continuing Or National Importance Exist In This Case	5
II. The District Court Correctly Dismissed This Case For Failure To Effect Timely Service	6
A. Smolko's January 1996 attempt at service was improper	7
B. Smolko's April 23, 1996 attempt at service was untimely and the district court correctly declined to grant her a second extension of time to perfect service	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Adams v. Allied Signal Aerospace Co., 74 F.3d 882 (8th Cir. 1996) 9
Arens v. G. R. Mfg. Co., No. 4:90-CV-112, 1991 U.S. Dist. LEXIS 3288 (W.D. Mich. Mar. 13, 1991) 7
Comer v. Interstate United Corp., 118 F.R.D. 79 (N.D. Ill. 1987) 7
Delicata v. Bowen, 116 F.R.D. 564 (S.D.N.Y. 1987) 9
Estate of Zachery v. Questcare, 895 F. Supp. 1472 (M.D. Ala. 1995) 9-10
Florida Physician's Ins. Co. v. Ehlers, 8 F.3d 780 (11th Cir. 1993) 6
Grammenos v. Lemos, 457 F.2d 1067 (2d Cir. 1972) 7
Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949) 9
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 5
Panaras v. Liquid Carbonic Indus. Corp., 94 F.3d 338 (7th Cir. 1996) 9
Petrucelli v. Bohringer & Ratzinger, 46 F.3d 1298 (3rd Cir. 1995) 9
Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) 5
Schnabel v. Wells, 922 F.2d 726 (11th Cir. 1991) 6
Solaroll Shade & Shutter Corp. v. Bio-Energy Sys., Inc., 803 F.2d 1130 (11th Cir. 1986) 6
Traina v. United States, 911 F.2d 1155 (5th Cir. 1990) 9
Wei v. State of Hawaii, 763 F.2d 370 (9th Cir. 1985) 9

STATUTES

Fed. R. Civ. P. 4 ..... 2, 6
Fed. R. Civ. P. 4(a) 7
Fed. R. Civ. P. 4(c) 8
Fed. R. Civ. P. 4(d) 6
Fed. R. Civ. P. 4(m) 2, 5, 9

TABLE OF AUTHORITIES—Continued

	Page
Fed. R. Civ. P. 60(b)	3, 6
Sup. Ct. R. 10	4
Sup. Ct. R. 29.6	ii
28 U.S.C. § 1254(1)	1
42 U.S.C. § 1981a	2
42 U.S.C. § 2000e, *et seq.*	2

OTHER

Wright & Miller, Federal Practice and Procedure, § 1085, p. 23	7

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Eleventh Circuit are unreported and are set forth in the Appendix to the Petition for Writ of Certiorari at pages App. 8 to App. 11. The opinion of the United States District Court for the Southern District of Georgia is unreported and is set forth in the Appendix to the Petition at pages App. 1 to App. 7.

STATEMENT OF JURISDICTION

This Court has jurisdiction over the Petition for Writ of Certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Fed. R. Civ. P. 4(m) provides:

> **Time Limit for Service.** If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

STATEMENT OF THE CASE

On May 27, 1993, Petitioner Debra M. Smolko filed a complaint seeking relief against GTE Service Corporation ("GTE") under Title VII, 42 U.S.C. § 2000e, *et seq.*[1] (Record 1 at 1.) The clerk of the district court issued a summons on the same date. (Record 9-Exh. D.) On September 24, 1993, the 120th day after filing her complaint, Smolko mailed a notice and acknowledgment of service by mail to GTE. (Record 23 at 2.) GTE did not acknowledge service by mail, having received the request after the 120 days allowed for service under Fed. R. Civ. P. 4 had expired. (Record 23 at 2; Record 14 at 2.) When Smolko made no effort to request an extension of time to serve or otherwise prosecute her action for nearly two years, the district court dismissed the case for lack of prosecution, and the clerk entered judgment accordingly. (Record 2; Record 3.)

Over three months later, Smolko sent the district court a letter, *ex parte*, requesting the court reopen the action

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[1] Smolko's complaint did not cite Title VII, but sought relief under the Civil Rights Act of 1991, 42 U.S.C. § 1981a, the amendments to the remedial provisions of Title VII. (Record 1.)

and claiming "legal misrepresentation" as the basis for reopening. (Record 4.) Apparently treating Smolko's correspondence as a motion for relief from judgment under Fed. R. Civ. P. 60(b), the district court entered an order directing Smolko to show cause why the case should be reopened. (Record 5.) Smolko responded by a second letter, again *ex parte*. (Record 6.) The district court entered an order reopening the action on October 5, 1995. (Record 7.)

Smolko, now represented by new counsel, filed an amended complaint on October 26, 1995, but did not seek the issuance of a new summons or request an extension of time to effect service. (Record 9.) Smolko then mailed to GTE a request for waiver of service with the amended complaint. (Record 23 at 3; Record 17-Exh. A.) GTE declined to waive service of the amended complaint because to do so might waive GTE's defense that the case should be dismissed on the basis of Smolko's failure to effect timely service of her original complaint. (Record 14 at 2.)

On January 17, 1996, Smolko personally served GTE's registered agent with a copy of the amended complaint, but did not include a separate copy of a valid summons. (Record 12.) Rather, the only summons contained in the package served on GTE's agent was a copy of the original summons issued over two and a half years earlier. This summons was attached to the amended complaint as an exhibit supporting the allegations in the amended complaint. (Record 12; Record 9-Exh. D.) Further, the package included a request for waiver of service of summons. (Record 12.) Thus, it appeared Smolko was again requesting GTE waive service of a separate, valid summons.

When GTE did not waive service, Smolko obtained a new summons (issued on April 17, 1996) and on April 23, 1996, personally served the new summons and the

amended complaint on GTE's agent. (Record 13.) This service was nearly three years after the original complaint was filed and 180 days after the amended complaint was filed.

After finally receiving valid (but untimely) personal service, GTE filed a motion for reconsideration of the district court's order reopening the case and to dismiss for failure to timely effect proper service. (Record 14.) The district court held that (1) by reopening the case on October 5, 1995, it implicitly granted Smolko an extension of time to serve her amended complaint,[2] (2) Smolko's attempt to serve GTE on January 17, 1996 was invalid, and (3) the time for Smolko to serve her amended complaint should not be extended to April 23, 1996, when Smolko finally effected proper (but untimely) service. (Record 23 at 4-6.) Accordingly, the district court granted GTE's motion to dismiss. (Record 23 at 7.) The clerk entered judgment in favor of GTE and against Smolko. (Record 24; Record 25.)

Smolko appealed to the United States Court of Appeals for the Eleventh Circuit, which issued an unpublished, per curiam opinion affirming the district court's dismissal of Smolko's case. (Appendix to the petition at App. 8-9.) The Eleventh Circuit likewise denied Smolko's petition for rehearing and suggestion of rehearing en banc. (Appendix to the petition at App. 10-11.)

REASONS FOR DENYING THE WRIT

A petition for a writ of certiorari should be granted only "for compelling reasons." Sup. Ct. R. 10. The decision below is correct, does not conflict with any decision of this Court or of another court of appeals, and presents no issue of continuing or national importance that merits

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[2] The court rejected as moot GTE's argument that the case should not have been reopened in the first place. (Record 23 at 3, n.2.)

this Court's attention. Accordingly, review by this Court is not warranted.

I. No Issues Of Continuing Or National Importance Exist In This Case.

Smolko's only argument that this case merits review by this Court—that the opportunity to interpret Rule 4(m) for the first time is an important question of federal law—is simply wrong. The meaning of Fed. R. Civ. P. 4(m) is plain on its face and needs no further elaboration or interpretation by this Court. Nor does the issue presented by this case arise out of a split of authority among the circuits. Indeed, in this case, the parties never disputed that under Rule 4(m) a district court (1) must grant an extension of time to effect service if "good cause" exists, and (2) has discretion to grant an extension of time to effect service even in the absence of "good cause." *See*, Fed. R. Civ. P. 4(m) advisory committee's note (1993 Amendments). Likewise, the district court applied this two step analysis, (1) correctly finding Smolko had not demonstrated good cause, and (2) declining to grant a second discretionary extension because the court had already given Smolko an extension of time to effect proper service of this action and she failed to do so. (Order, Appendix to the petition at App. 6.)

It is apparent, therefore, although the issues raised by the petition are important to the parties, they are neither important to the public at large, novel, nor difficult. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (stating "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties"); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955) (issues must be "beyond the academic or the episodic"). This Court, therefore, should deny the petition.

II. The District Court Correctly Dismissed This Case For Failure To Effect Timely Service.

Smolko tried four times over almost three years to serve this action. Every attempt was either improper, untimely, or both. Accordingly, the district court properly granted GTE's motion to dismiss.

Smolko's first attempt at service came on September 24, 1993 when she mailed a notice and acknowledgment of service by mail to GTE pursuant to the pre-December 1993 Rule 4(c)(2). GTE did not acknowledge service by mail and Smolko never attempted personal service of the complaint. Thus, service was never perfected and the district court properly dismissed the case for failure to prosecute. *See, Schnabel v. Wells,* 922 F.2d 726, 728 (11th Cir. 1991) (unacknowledged service by mail does not constitute service under Fed. R. Civ. P. 4.). About this, there is no dispute.

Smolko's next effort at service occurred after Smolko convinced the district court through *ex parte* filings to re-open the case and allow her to file an amended complaint.[3] Smolko first tried to serve the amended complaint by mailing it to GTE with a request for waiver of service pursuant to Rule (4)(d), as amended in December 1993. GTE

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[3] The district court erred by reopening. The only justification Smolko advanced in her *ex parte* requests to reopen was "legal misrepresentation," which is not a valid reason for relief under Rule 60(b) where neither Smolko nor her attorney took any steps whatsoever for two years to prosecute this action. *See, Solaroll Shade & Shutter Corp. v. Bio-Energy Sys., Inc.,* 803 F.2d 1130, 1132 (11th Cir. 1986) ("An attorney's negligen[ce] . . . does not constitute excusable neglect, even if that attorney is preoccupied with other litigation."); *Florida Physician's Ins. Co. v. Ehlers,* 8 F.3d 780, 784 (11th Cir. 1993) (denying request for relief under Rule 60(b) based on attorney neglect because litigant had "duty to act with some diligence to ensure that her attorney was protecting [her] interests"). The district court could and should have dismissed the case on this basis as well.

declined to waive service. Again, there is no dispute that this attempt did not perfect service.

A. Smolko's January 1996 attempt at service was improper.

In January 1996, Smolko again requested GTE to waive service of a valid summons by personally serving the amended complaint and a request for waiver on GTE's registered agent. This attempt at service was improper because the package served did not include a separate, valid summons. Although a copy of the 1993 summons was attached as exhibit D to the amended complaint served on January 17, 1996, this summons expired on September 24, 1993, and thus could not be used to perfect service. *See, Grammenos v. Lemos*, 457 F.2d 1067, 1071 (2d Cir. 1972) ("[T]he court has power, under Fed. R. Civ. P 4(a), if the service is invalid or improper, to cause *additional or new summons* to be issued and good service attempted.") (emphasis added); *Arens v. G. R. Mfg. Co.*, No. 4:90-CV-112, 1991 U.S. Dist. LEXIS 3288 (W.D. Mich. Mar. 13, 1991) (finding that on 120th day after issuance, "pursuant to Fed. R. Civ. P. 4(j) the Summons in this matter expired"); *Comer v. Interstate United Corp.*, 118 F.R.D. 79, 81 (N.D. Ill. 1987) ("The summons issued with the original complaint was invalid because the original summons and complaint were not served upon [defendant] within 120 days[.]"); Wright & Miller, Federal Practice and Procedure, § 1085, p. 23 ("The life of a summons, then, is 120 days.").

Moreover, the January 1996 attempt at service was invalid because even if the summons had not expired, Smolko did not serve GTE with a separate copy of the summons. Rather, she personally served GTE with a request for waiver of service of summons. (Record 12.) The plain language of Rule 4(c) requires service of a complaint *and* a separate summons to put a defendant

on notice that it must respond to the complaint. By hiding the summons as exhibit D to the amended complaint while simultaneously serving GTE with a request for waiver and thereby misleading GTE to believe that she was not attempting personal service, Smolko failed to comply with the plain language of Rule 4(c).

Smolko's own conduct belies her argument that the January 1996 attempt at service was proper. Rather than seeking a default after GTE did not answer within twenty days of January 17, 1996, Smolko obtained a new summons and made another attempt at service on April 23, 1996.[4] (Record 13.)

B. Smolko's April 23, 1996 attempt at service was untimely and the district court correctly declined to grant her a *second* extension of time to perfect service.

Smolko's final attempt at service came on April 23, 1996 when she personally served on GTE's agent a package containing the amended complaint (filed on October 26, 1995) and a new summons issued on April 17, 1996. This attempt at service was untimely because it was more than 120 days after both (1) the case was reopened and (2) Smolko filed her amended complaint.

When GTE moved to dismiss, Smolko asked the district court for a second discretionary extension up to and including April 23, 1996. The district court properly refused the request because Smolko neither demonstrated good cause nor a sufficient basis for the court to grant a discretionary extension.

Smolko contends "good cause" existed because (1) the statute of limitations would bar the refiling of her action and (2) GTE allegedly "concealed" the defect in her

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[4] Smolko sought the entry of default on May 29, 1996, *after* she obtained a new summons and *after* GTE moved to dismiss. (Record 15.)

January 17, 1996 attempt at service. Both arguments are without merit. First, Smolko's inability to refile this action because the statute of limitations expired does not constitute good cause. *Traina v. United States*, 911 F.2d 1155, 1157 (5th Cir. 1990) ("It is well settled that inability to refile a suit does not bar dismissal[.]"); *accord, e.g., Wei v. State of Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985); *Delicata v. Bowen*, 116 F.R.D. 564, 566 (S.D.N.Y. 1987). Second, Smolko's argument that GTE "concealed" the defect in her January 17, 1996 attempt at service is wholly unsupported by the record and false.[5] Smolko never cited any facts or law in support of this conclusory allegation. Moreover, Smolko could have discovered her failure to serve a valid summons by simply examining her amended complaint and the affidavit of service filed with the district court on January 25, 1996. Indeed, Smolko discovered her mistake and corrected it in April 1996, when she obtained a new summons and re-served GTE. (Record 13.)

Likewise, the district court correctly declined to exercise its discretion to grant Smolko a second extension of time to serve until April 23, 1996. A discretionary extension under Rule 4(m) was not required simply because the statute of limitations for Smolko's claim had expired. In the absence of good cause, "a district court may in its discretion still dismiss a case even after considering that the statute of limitations has run." *Panaras v. Liquid Carbonic Indus. Corp.*, 94 F.3d 338, 341 (7th Cir. 1996); *accord, e.g. Adams v. Allied Signal Aerospace Co.*, 74 F.3d 882, 887 (8th Cir. 1996); *Petrucelli v. Bohringer & Ratzinger*, 46 F.3d 1298, 1306 (3rd Cir. 1995); *Estate of Zachery v. Questcare*, 895 F. Supp.

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[5] Moreover, "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

1472, 1474-76 (M.D. Ala. 1995) (dismissing case even though a subsequent filing would be barred by the statute of limitations because, as here, "the plaintiff's actions . . . resulted in and were the sole cause of the ultimate failure to effect timely service of process").

Thus, there is no basis for excusing Smolko's failure to effect proper, timely service. The district court, therefore, properly dismissed this action, and the Eleventh Circuit properly affirmed. This Court should not expend its limited resources by reviewing Smolko's frivolous attempt to obtain yet another opportunity to prosecute this action.

CONCLUSION

For the foregoing reasons, Respondent respectfully suggests this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

MICHAEL W. JOHNSTON
Counsel of Record
SCOTT G. BLEWS
KING & SPALDING
191 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 572-4600
Counsel for Respondent

Dated: June 13, 1997